86-838 (1)

No.

Supreme Court, U.S.
FILED
NOV 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

October Term, 1986

HAROLD NORDLICHT, on behalf of himself and all others similarly situated,

Petitioner,

vs.

NEW YORK TELEPHONE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the assertion of preemption by a defendant as a defense to a complaint pleading only state common law causes of action support removal jurisdiction?

2. Are claims sounding only in common law tort federal claims under federal common law providing the federal courts with exclusive original jurisdiction?

3. Do plaintiff's state common law claims "arise under" federal law pursuant to the General Federal Question Statute, 28 U.S.C §1331?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The caption of the case in this Court contains the names of all parties.

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In The Supreme Court of the United States

October Term, 1986

HAROLD NORDLICHT, on behalf of himself and all others similarly situated,

Petitioner,

vs.

NEW YORK TELEPHONE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

Federal Court Opinions:

Nordlicht v. New York Telephone Co., 617 F. Supp. 220 (1985), *aff'd*, 799 F.2d 859 (1986).

JURISDICTION

The judgment of the Second Circuit Court of Appeals was dated and filed on August 25, 1986. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. §1331, Federal question.

"The district courts shall have original jurisdiction of all

civil actions arising under the Constitution, laws, or treaties of the United States."

STATEMENT OF THE CASE

Harold Nordlicht, a resident of the State of New York, while in Canada, placed two types of telephone calls:

a. Calls from one city in Canada to another city in Canada ("intraCanada calls"); and

b. Calls made from Canada to the United States ("the international calls"). (3a,44a).*

All calls were made through Canadian public coin telephones and charged on Mr. Nordlicht's New York Telephone Company ("Nytel") credit card (2a,18a). The Canadian telephone company priced these calls in Canadian dollars (51a, 53a) which were billed to Nordlicht by ATT in American dollars through its wholly owned subsidiary, Nytel, without any currency conversion (52a, 53a). The effect was to overcharge Nordlicht by approximately 15 percent (i.e., a Canadian dollar was at that time worth approximately 85 cents American) (3a). Nordlicht commenced a class action in New York State Supreme Court for fraud and for money had and received against Nytel for failing to make a currency conversion of the Canadian charges into the U.S. dollar equivalent (42a-46a). The Canadian rate charged for these telephone calls was not contested. Similarly, the procedure used to establish those rates in the United States was not contested.

Nytel removed the case to the United States District Court for the Southern District of New York pursuant to

*Refers to Appendix filed simultaneously with Petition.

28 U.S.C. §1441, alleging that the District Court had original jurisdiction under 28 U.S.C. §1331 and §1337 (a Civil Action arising under an Act of Congress Regulating Commerce) (37a-39a). Nordlicht moved to remand or, in the alternative, for summary judgment. Nytel moved for judgment on the pleadings and dismissal of the fraud claim for failure to plead fraud with particularity (3a, 19a, 31a). The District Court denied the motion to remand and converted defendant's motion into a cross motion for summary judgment. The District Court dismissed with prejudice the claim for money had and received with respect to the international calls and dismissed without prejudice the remainder of Nordlicht's claims and granted leave to replead within twenty days. Nordlicht did not file an amended complaint, and the District Court dismissed the complaint with prejudice, and Nordlicht appealed (40a, 41a).

The Second Circuit held that (i) the Federal Communications Act, 47 U.S.C. §1 et seq., did not effect Nordlicht's claims, (ii) his action did not arise under an Act of Congress, and (iii) Nytel's removal on that basis was invalid (5a).

The Second Circuit, however, sustained removal of the state common law causes of action on the basis that federal law preempts state law in all areas of interstate telecommunications and Nordlicht's claims must necessarily arise under federal common law, relying upon 28 U.S.C. §1331 (6a-7a).

This holding directly conflicts with this Court's prior holdings in *Nader v. Allegheny Airlines,* 426 U.S. 290 (1976) and *Pennsylvania R.R. Co. v. Puritan Coal Co.,* 237 U.S. 121 (1915). It also conflicts with *Hunter v. United Van Lines,* 746 F.2d 635, 639-40 (9th Cir. 1984),

cert. denied, 54 U.S.L.W. 3227 (1985), which held that when plaintiff presents a state law claim and defendant asserts federal law by way of defense, that such defense is not a basis for removal under 28 U.S.C.A. §1441(a). The conflict between the Circuits on the issue of removal from state to federal court based on preemption presents an important question of federal law which should be settled by the Court. Sup. Ct. R. 17.1(a);(c).

REASONS FOR GRANTING THE WRIT

This Court Should Grant The Writ In Order To Resolve The Conflict Between Two Circuits

The Second Circuit held that because federal law preempts state law in the area of interstate telecommunications and because Nordlicht's state common law claims must necessarily arise under federal common law, the motion to remand was properly denied (7a). This ruling is in conflict with the ruling of the Ninth Circuit Court of Appeals in *Hunter v. United Van Lines, supra.*

a. The presence of a federal preemption defense does not provide a basis for removal from state court on the ground of federal jurisdiction.

Removal Statutes are strictly construed out of regard for the rightful independence of state governments. See, *La Chemise LaCoste v. Alligator Co., Inc.,* 506 F.2d 339 (3d Cir. 1974), *cert. denied,* 421 U.S. 937 (1975).

A defendant may not procedurally boot-strap himself into Federal Court by the assertion of the Federal Preemption Doctrine. See *Gully v. First Nat. Bank of Meridian,* 299 U.S. 109 (1936). As was stated in *Hunter v. United Van Lines,* 746 F.2d at 639-640:

> [A] case 'arises under' federal law within the meaning of the general federal question statute only if the federal question appears on the face of plaintiff's well-pleaded complaint; if not, original jurisdiction is lacking even if the defense is based on federal law. . . . A defendant thus cannot remove a state-law claim from state to federal court even if his defense is based entirely on federal law.
>
> * * *
>
> When . . . plaintiff presents a state-law claim and defendant counters by arguing that federal law preempts the state law on which plaintiff relies, the federal claim appears by way of defense. . . . Under the well-pleaded complaint rule, federal jurisdiction over such a claim is lacking.

Although *Hunter* was dealing with 28 U.S.C. §1337, its rationale is equally applicable to 28 U.S.C. §1331:

> [W]e note that 'the 'arising under' langauge in section 1337 is interpreted in essentially the same way as the 'arising under' phrase in section 1331.' . . . In interpreting that language in section 1337, therefore, we shall draw freely from authorities discussing the circumstances under which a case 'arises under' federal law within the meaning of section 1331."

Hunter, 746 F.2d at 639.

Yet, *Nordlicht, supra,* without addressing the issue, held that the assertion of the federal preemption defense was a sufficient and proper predicate to sustain removal jurisdiction (7a).

b. The artful pleading doctrine does not provide a basis for removal.

Nordlicht rejected the argument that removal was improper, stating that plaintiff's state law complaint was artfully pleaded (7a). However, *Hunter,* recognizing that

"the artful pleading doctrine is to be invoked only in *exceptional circumstances* . . ." rejected this conclusion:

> "If we were to accept Appellees' argument that the artful pleading doctrine applies whenever federal law preempts plaintiffs' state-law claims, we would be entirely eliminating the general rule that federal jurisdiction does not exist simply because the defendant claims preemption as a defense.

Hunter, 746 F.2d at 641.

Hunter further held that "the artful pleading doctrine applies in the preemption context only when a plaintiff has a federal claim to assert." (*Id.* at 642). Thus, plaintiff's "state-law claim may be recharacterized as a federal claim only when the state-law claim is preempted by federal law *and* when it is apparent from a review of the complaint that federal law provides plaintiff a cause of action to remedy the wrong he asserts he suffered." *Id.* at 642-643.

Hunter went on to hold, in direct contravention to *Nordlicht,* that ". . . removal is improper when federal law simply displaces state law without replacing the state cause of action with a federal one." *Id.* at 643.

That is just the case here because the Communications Act specifically preserves Nordlicht's state common law causes of action:

> "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute. . . ." 47 U.S.C. §414.

This language is identical to the language of former Section 22 of the Interstate Commerce Act, 49 U.S.C.A. §22. This Court held that such a statute "[D]id not supersede the jurisdiction of state courts . . . where the decision did

not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission; or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive." *Pennsylvania R.R. Co. v. Puritan Coal Co.*, 237 U.S. 121 at 130 (1915). See also *Nader v. Allegheny Airlines,* 426 U.S. 290 (1976); Cf. *Ivy Broadcasting Co. v. American Telephone and Telegraph Co.*, 391 F.2d 486 (2d Cir. 1968).

The Communications Act does not deprive New York State courts of jurisdiction over state common law claims for fraud and money had and received, and Nytel's preemption defense cannot serve as a basis for removal.

c. There is no federal removal jurisdiction based on general "arising under principles."

Nordlicht held that plaintiff's state-law claims, as pleaded, "arise under" federal law within the meaning of 28 U.S.C. §1331. *Hunter* specifically held that such state common law claims do not. *Hunter,* 746 F.2d at 644.

Federal law is inconsequential since the underlying telephone charges were not challenged in *Nordlicht.** The claim in *Nordlicht* involves the failure to effect a currency conversion for bills payable in Canadian rates.

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*Therefore, the test reaffirmed in *Hunter* to qualify as "arising under" that "(a) substantial proposition of federal law must form 'a direct and essential element of the *plaintiff's* cause of action' " (*Id.* at 644) clearly has not been met.

CONCLUSION

For all of the foregoing reasons, this petitioner submits that a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Dated: November 17, 1986

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APPENDIX A—DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1372—August Term 1985

Argued: May 27, 1986 Decided: August 25, 1986

Docket No. 86-7218

HAROLD NORDLICHT, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

—v.—

NEW YORK TELEPHONE COMPANY,

Defendant-Appellee.

Before:

FEINBERG, *Chief Judge*,
NEWMAN and KEARSE, *Circuit Judges*.

Appeal from a judgment of the District Court for the Southern District of New York (Charles S. Haight, Jr., Judge) dismissing, on cross-motions for summary judgment, plaintiff's claims for money had and received and

fraud, and challenging the District Court's denial of plaintiff's motion to remand case to state court.

Affirmed.

ROBERT E. FREY, New York, N.Y. (Herbert I. Deutsch, Deutsch and Frey, New York, N.Y., on the brief), *for plaintiff-appellant*.

WALTER C. REID, New York, N.Y. (John M. Clarke, Gerald M. Oscar, Saul Scheier, New York, N.Y., on the brief), *for defendant-appellee*.

JON O. NEWMAN, *Circuit Judge*:

This appeal primarily concerns the lawfulness of charges of the defendant-appellee New York Telephone Company (NYTel) for phone calls that originate outside the United States and are billed to NYTel credit cards. The appeal also presents the issue, rarely litigated, whether federal jurisdiction over a claim arising under federal common law is exclusive. Harold Nordlicht appeals from a judgment of the District Court for the Southern District of New York (Charles S. Haight, Jr., Judge) dismissing, on cross-motions for summary judgment, his claims for money had and received and fraud. Nordlicht also challenges the District Court's denial of his

motion to remand the case to state court. For reasons that follow, we affirm.

I. Background

This appeal concerns two types of phone calls: calls made from one location in Canada to another location in Canada (the "intra-Canada calls") and calls made from Canada to the United States (the "international calls"). Nordlicht made both types of phone calls and charged them by use of a credit card issued by NYTel. Nordlicht alleges that, with respect to both types of calls, the local Canadian phone company priced the calls and billed NYTel for them in Canadian dollars. During the relevant period, the prevailing exchange rate was approximately $1 Canadian = $.85 American. Nordlicht alleges that NYTel billed him in American dollars, without conversion, paid the Canadian phone company in cheaper Canadian dollars, and pocketed the difference.

Based on these allegations, Nordlicht brought a putative class action in New York Supreme Court and asserted claims against NYTel for money had and received and fraud. NYTel removed the case to the Southern District of New York on federal question grounds. Nordlicht moved for a remand to state court, *see* 28 U.S.C. § 1447(c) (1982), and, in the alternative, for summary judgment, *see* Fed. R. Civ. P. 56. Defendant moved for judgment on the pleadings, *see* Fed. R. Civ. P. 12(c), and dismissal of the fraud claim for failure to plead with particularity, *see* Fed. R. Civ. P. 9(b). The District Court denied the motion to remand. Because defendant's Rule 12(c) motion went beyond the face of the pleadings, the District Court converted it into a cross-motion for summary judgment. On the merits, the District Court dis-

missed with prejudice Nordlicht's money had and received claim with respect to the international calls. The District Court dismissed without prejudice the remainder of Nordlicht's claims and granted leave to replead within twenty days. Since Nordlicht did not file an amended complaint within that period, the District Court dismissed the remainder of Nordlicht's claims with prejudice. This appeal followed.

II. Subject Matter Jurisdiction

NYTel removed this case on federal question grounds. 28 U.S.C. § 1441(a) (1982). It seeks to uphold denial of Nordlicht's remand motion by contending that his claims arise under the Federal Communications Act, 47 U.S.C. § 1 *et seq.*, or federal common law. We consider each basis in turn.

Congress has placed common carriers providing interstate telephone service under the jurisdiction of the Federal Communications Commission (FCC) and has enacted a comprehensive regulatory scheme. For example, such carriers are required to furnish telephone service upon reasonable request. *See id.* § 201(a). They are required to file tariffs regarding their rates, to charge reasonable rates, and to avoid unreasonable or discriminatory practices. *See id.* §§ 201-203. Contracts between carriers must also be filed. *See id.* § 211.

Congress has provided a general jurisdictional grant to adjudicate controversies arising under the Communications Act:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as

> hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

Id. § 207. NYTel argues that Nordlicht's claims arise under the Communications Act because the contracts governing its billing methods are on file with, and subject to the supervision of, the FCC.

However, the mere fact that the Communications Act governs certain aspects of defendant's billing relationships with its customers does not mean that Nordlicht's claims arise under the Act. The arguments made by NYTel are similar to arguments we rejected in *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486 (2d Cir. 1968). In *Ivy*, the plaintiff contracted with a telephone carrier for service in connection with the broadcast of sixteen Syracuse University football games. Finding the service unsatisfactory, plaintiff sued the carrier on theories of negligence and breach of contract. Noting that "there is no reason to believe that Congress, in the Communications Act, intended to declare the existence of the fundamental right to recover for tort or breach of contract," *id.* at 489, we held that, since plaintiff was not alleging violation of any specific provision of the Act, jurisdiction did not lie under 47 U.S.C. § 207. Similarly, Nordlicht alleges violation of traditional common law standards and does not allege violation of any specific provision of the Communications Act. Therefore, section 207 does not provide a basis for removal.

In the alternative, NYTel relies on federal common law to support removal. Again, *Ivy* is pertinent. In *Ivy*, we held that, due to the comprehensive nature of Congress's regulation of telephone carriers, federal law preempted state law with regard to certain classes of claims and supplanted it with federal common law:

> [Q]uestions concerning the duties, *charges* and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and . . . the states are precluded from acting in this area. Where . . . the Communications Act itself . . . [does not] deal[ ] with a particular question, the courts are to apply a uniform rule of federal common law.

391 F.2d at 491 (emphasis added). We also held that the general federal question statute, 28 U.S.C. § 1331, provided a jurisdictional basis for claims arising under federal common law, a conclusion later confirmed by the Supreme Court in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

Ivy applied federal common law with respect to claims concerning interstate telecommunications service. The same considerations informing that decision manifestly lead to application of federal common law with respect to Nordlicht's claims concerning the international calls. The Act applies to "all interstate and foreign communication by wire or radio." 47 U.S.C. § 152. Though the intra-Canada calls might not be governed by any provision of the Act, the considerations expressed in *Ivy* also make it appropriate to fashion a uniform body of federal common law for resolution of claims against domestic telecommunications carriers with respect to their billing

practices for calls made within a foreign country. We therefore conclude that all of Nordlicht's claims arise under federal common law and that section 1331 provides a jurisdictional basis for his suit.

Nordlicht argues that this conclusion violates the principle that a plaintiff is master of his complaint and may avoid removal by relying solely on state law. *See The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). His argument fails to reckon with the "artful pleading" doctrine. As we recently stated:

> If the only remedy available to plaintiff is federal, because of preemption or otherwise, and the state court necessarily must look to federal law in passing on this claim, the case is removable regardless of what is in the pleading.

Travelers Indemnity Co. v. Sarkisian, No. 85-7935 et al., slip op. 4155, 4162 (2d Cir. June 19, 1986) (quoting 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3722, at 273-75 (2d ed. 1985)). In these circumstances, a complaint, although purporting to rely solely on state law, is said to contain federal claims artfully pled. Because federal law preempts state law in the area of interstate telecommunications and Nordlicht's claims must necessarily arise under federal common law, the motion to remand was properly denied.

Despite its action in removing the case and in successfully defeating the remand motion, NYTel further contends, in response to an inquiry from this Court, that the proper disposition of the suit is dismissal for lack of removal jurisdiction.[1] NYTel does not doubt that a claim

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1 Since NYTel's objection goes to the subject matter jurisdiction of the District Court, NYTel may raise this objection even though it was not

over which a district court has original subject matter jurisdiction is normally removable pursuant to 28 U.S.C. § 1441. However, it contends that Nordlicht's claims, even if arising under federal common law rather than federal statutory law, are within the exclusive jurisdiction of the federal courts and for that reason must be dismissed. The second step in this argument relies on the anomalous doctrine of derivative jurisdiction. Since a district court's jurisdiction is derivative in a removal context, a district court must dismiss a complaint if the state court from which the case was removed lacked jurisdiction. This result obtains even if the reason the state court lacked jurisdiction is that the complaint lies within the exclusive jurisdiction of the federal courts. *See Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943); *Lambert Run Coal Co. v. Baltimore & Ohio Railroad Co.*, 258 U.S. 377 (1922).[2] Congress has recently abol-

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presented to the District Court and even though NYTel is the party that invoked the District Court's jurisdiction by way of removal. *See American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951).

2 In *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), the Supreme Court may have implicitly relaxed the rigor of the doctrine of derivative jurisdiction in the context of artful pleading. In *Federated Stores*, the Court held that a claim pled under state antitrust law was in reality a federal antitrust claim artfully pled. Federal antitrust claims are within the exclusive jurisdiction of the federal courts. *See Freeman v. Bee Machine Co.*, *supra*, 319 U.S. at 451 n.6; *General Investment Co. v. Lake Shore & Michigan Southern Railway Co.*, 260 U.S. 261, 287 (1922). Under the doctrine of derivative jurisdiction, one would have expected the Court to order dismissal of the "federal" claim. However, without discussion of the derivative jurisdiction doctrine, the Court upheld the District Court's removal jurisdiction, 452 U.S. at 397 n.2, and adjudicated the merits. Subsequently one District Court, though noting that *Federated Stores* had created "a shadow of doubt" as to the continuing validity of the derivative jurisdiction doctrine, concluded that the doctrine remained unimpaired and applied it to dismiss without prejudice a claim in a removed suit that was deemed to be a federal antitrust claim artfully pled. *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566,

ished the doctrine of derivative jurisdiction for claims in civil actions filed in state courts after June 19, 1986. *See* Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3, 100 Stat. 633, ____ (1986) (adding new subsection (e) to 28 U.S.C. § 1441). However, the doctrine remains applicable to Nordlicht's claims since his civil action was filed in the New York Supreme Court on April 12, 1982. We therefore turn to NYTel's premise—that Nordlicht's claims are within the exclusive jurisdiction of federal courts.

Federal courts, not surprisingly, have had few, if any, occasions to consider whether claims founded on federal common law are within exclusive federal jurisdiction. There are few areas of federal common law and even fewer areas of exclusive federal jurisdiction, and the question of whether both areas ever overlap to create exclusive jurisdiction over federal common law claims can arise in the district courts and courts of appeals only in a removal context. Our starting point is the general presumption that state courts enjoy concurrent jurisdiction over federal claims. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962). This presumption "can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court

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578-80 (N.D. Cal. 1981). The Ninth Circuit reversed on this point, believing *Federated Stores* to have created an exception to the doctrine of derivative jurisdiction at least for a removed "federal" claim artfully pled in state court after the same claim had been brought in federal court and dismissed with prejudice. *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1432-33 (9th Cir. 1984).

We need not decide the effect of *Federated Stores* on this aspect of the pending appeal since we conclude below that the state court had concurrent jurisdiction.

jurisdiction and federal interests." *Gulf Offshore Co. v. Mobil Oil Corp.*, *supra*, 453 U.S. at 478. With regard to an area of federal common law, which is normally developed by inference from statutes, it is not surprising that there are no express Congressional commands. As a result, our inquiry must focus on considerations that would make it inappropriate for state courts to exercise jurisdiction over federal common law claims in the interstate telecommunications area. The standards for such an inquiry have recently been enunciated by the Supreme Court:

> The factors generally recommending exclusive federal-court jurisdiction over an area of federal law include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims.

Id. at 483-84 (citations omitted).

In urging exclusive federal court jurisdiction for federal common law claims in the area of interstate telecommunications, NYTel emphasizes that Congress has provided a comprehensive system for the regulation of telephone carriers in the Federal Communications Act. There is a need for uniformity in determining the duties and liabilities of such carriers. Indeed, the need for uniformity is the reason we held in *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, *supra*, that federal common law preempts state law and supplies the rule of decision fo· tort and contract claims relating to the duties, charges, and liabilities of telephone carriers concerning interstate telecommunications.

The Supreme Court has cautioned, however, that the need for uniformity in the application of federal legal standards is not alone a sufficient basis on which federal courts may determine that their jurisdiction is exclusive. *See Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656, 665-66 (1961); *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U.S. 285, 290-91 (1922). Moreover, we have previously observed in the copyright context that, though a true copyright claim would lie within the exclusive jurisdiction of federal courts under 28 U.S.C. § 1338(a), a copyright-related claim governed by federal common law and within section 1331 jurisdiction would be within the concurrent jurisdiction of federal courts. *See T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964) (Friendly, J.), *cert. denied*, 381 U.S. 915 (1965). Mindful of the cautions expressed by the Supreme Court concerning exclusivity of federal statutory claims, we think it would take a truly extraordinary set of circumstances to demonstrate that a claim arising under federal common law is within exclusive federal court jurisdiction.[3] Even if statutory claims under the Communications Act are within exclusive federal jurisdiction, which we do not decide,[4] we see no compelling circum-

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3 Prior to 1980, when Congress eliminated the $10,000 jurisdictional amount requirement of section 1331, *see* Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (1980), a holding that federal court jurisdiction over a federal common law claim was exclusive would have to have been limited to claims exceeding the $10,000 threshold amount or else any such claims failing to satisfy the $10,000 threshold amount could not have been brought in any court in the United States, federal or state. No federal statute creating exclusive federal court jurisdiction contains a monetary jurisdictional threshold.

4 A dictum in *Citibank, N.A. v. Graphic Scanning Corp.*, 618 F.2d 222, 225 (2d Cir. 1980), states that "the [Communications] Act vests exclusive jurisdiction over claims for damages for statutory violations of the Act in the federal courts or the FCC, 47 U.S.C. § 407." The

stances here to indicate a "disabling incompatibility," *Gulf Offshore Co. v. Mobil Oil Co.*, *supra*, 453 U.S. at 477, between Nordlicht's federal common law claims and state court adjudication.[5] Since the New York Supreme Court had concurrent jurisdiction over these claims, the District Court properly exercised derivative removal jurisdiction over them.

III. Money Had and Received

A. *The International Calls*. Nordlicht asserts a claim for money had and received with respect to the international calls. The essential elements of a claim for money had and received are that "(1) defendant received money belonging to plaintiff; (2) defendant benefitted from the receipt of money; and (3) under principles of equity and good conscience, defendant should not be permitted to keep the money." *Aaron Ferer & Sons, Ltd. v. Chase Manhattan Bank*, 731 F.2d 112, 125 (2d Cir. 1984) (citation omitted). As noted, Nordlicht alleges that NYTel inequitably retained his money by overcharging him in its capacity as collecting agent for the local Canadian phone company. Nordlicht alleges that the Canadian phone company priced the international calls and billed NYTel in Canadian dollars. Then, according to Nordlicht, NYTel billed him in American dollars, paid the Canadian

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citation to section 407, which concerns district court jurisdiction to enforce compliance with FCC orders for the payment of money, appears to be a typographical error; section 207, concerning claims for damages for any statutory violations of the Act, must have been intended. The issue of exclusive jurisdiction for statutory claims was not squarely posed in *Citibank* and, in the view we take of this case, need not be decided on this appeal.

5 Any defendant, preferring federal court application or exposition of federal common law, always has the option of removal, as this case demonstrates.

phone company in Canadian dollars, and pocketed the difference due to the greater worth of the American dollar.

The undisputed factual evidence on this summary judgment record demonstrates that NYTel is entitled to judgment. As to the international calls, NYTel's relationship with the phone companies of Canada is governed by the "Interconnection and Service Agreement Between the American Telephone and Telegraph Company [defendant's predecessor in interest] and the Trans-Canada Telephone System" (the "Agreement"). Under the Agreement, if a party makes a call between the United States and Canada, or vice versa, the party whose customer is to be billed prices the call and collects the charge in its own currency. The Agreement states that any call is to receive the same economic charge in both directions, with due regard for the exchange rate. Each month, the parties settle accounts pursuant to a complex profit-sharing formula. Whichever party owes money is to pay the other party half in the equivalent of Canadian dollars and half in the equivalent of American dollars. In addition to the Agreement, NYTel offered affidavit testimony to establish that the Agreement operates in this fashion. Despite Nordlicht's pleadings, on which he may not rely on these cross-motions for summary judgment, *see* Fed. R. Civ. P. 56(e), he presented to the District Court no evidence to the contrary.

Therefore, for the purpose of reviewing the District Court's grant of summary judgment, we must accept as true that NYTel operated in the manner established by the Agreement. As a result, there is no basis for Nordlicht's bare allegation that NYTel was billed in Canadian dollars,

collected the charge in American dollars, and pocketed the difference. Under the Agreement, when Nordlicht charged the international calls to his American credit card, NYTel treated Nordlicht as its customer. In effect, NYTel charged Nordlicht for making a call from the United States to Canada. Rather than acting as collecting agent for a Canadian phone company, NYTel priced the calls according to tariffs on file with the FCC and charged the requisite amount. NYTel charged Nordlicht in American dollars because that is how it charges all its customers who call Canada from the United States. There is no unfairness because, in formulating rates for United States-to-Canada phone calls, NYTel is required to take account of the exchange rate and to establish phone rates that ensure that the real economic cost of making these phone calls is the same in both directions.

On these facts, Nordlicht cannot make out a claim for money had and received with regard to the international calls. NYTel has not inequitably retained his money by collecting an amount greater than necessary to satisfy his debt with a Canadian phone company. Rather, it has merely collected a charge according to established United States rates from one of its customers. As the District Court noted, the filed tariff doctrine requires NYTel to bill its phone calls in accordance with its tariffs and prevents Nordlicht from making any challenge to these rates. *See Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 163 (1922); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981). Of course, how NYTel shares its profits with Canadian phone companies is of no concern to Nordlicht.

The District Court properly granted NYTel's motion for summary judgment with respect to the money had and received claim as to the international calls.

B. *The Intra-Canada Calls.* There is more of a factual basis for Nordlicht's money had and received claim with respect to the intra-Canada calls. These calls are not covered by the Agreement. The undisputed summary judgment evidence established that the intra-Canada calls were in fact priced and billed by the local Canadian phone company and that NYTel acted only as collecting agent. The Canadian phone companies billed NYTel in American dollars, and NYTel collected the charge from Nordlicht in American dollars. Since the record was silent, the District Court took the view of the facts most favorable to Nordlicht, as it was required to do, and assumed that the charge was billed and collected without the conversion needed to account for the currency exchange rate. Under these circumstances, Nordlicht was required to pay a higher price in real economic terms than he would have had to pay if he had simply put Canadian coins into a Canadian phone.

Despite the seeming unfairness of this system, the District Court correctly noted that Nordlicht could not recover unless the price of the phone calls had been quoted to Nordlicht in Canadian dollars, either expressly or by fair implication. If the price was quoted in American dollars, Nordlicht's making of the calls constituted an acceptance on these terms, and no claim for money had and received will lie. Even if the rate was quoted in Canadian dollars, NYTel was relieved of any responsibility on a money had and received theory once it turned over to a Canadian phone company the amount collected

from Nordlicht. Any recovery would lie only against the Canadian phone company for charging an amount in excess of its tariffs unless NYTel retained a service charge for collecting the debt.

However, in resisting summary judgment, Nordlicht did not present any evidence establishing that the price of the intra-Canada calls had been quoted to him in Canadian dollars or that NYTel retained a service charge from the collection process. Therefore, the District Court properly dismissed Nordlicht's claim. Although the District Court would have been justified in dismissing with prejudice, Nordlicht was generously allowed twenty days to amend his complaint to allege supportable claims. When Nordlicht failed to file an amended complaint, the District Court correctly dismissed with prejudice the money had and received claim with respect to the intra-Canada calls.

IV. Fraud

Nordlicht's fraud claim also had potential viability. If the local Canadian phone company affirmatively misrepresented that either the international calls or the intra-Canada calls were priced in Canadian dollars in a scheme to which NYTel was a party, and NYTel then collected payment for the calls in American dollars, without conversion, and pocketed the difference, Nordlicht would indeed have established a right to recover for fraud. Any potential recovery turns at least in part on the circumstances that induced Nordlicht to make his phone calls. The District Court noted that Nordlicht had neglected to plead how any of the phone call prices were quoted to him. The District Court dismissed Nordlicht's fraud claim

without prejudice for failure to comply with Fed. R. Civ. P. 9(b) but granted Nordlicht leave to replead. As before, Nordlicht chose not to take advantage of this opportunity, and the District Court was justified in dismissing Nordlicht's fraud claim as legally insufficient.

V. Conclusion

The judgment of the District Court is affirmed.

APPENDIX B—MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAROLD NORDLICHT, on behalf of himself and all other similarly situated,

Plaintiff,

-against-

NEW YORK TELEPHONE COMPANY,

Defendant.

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82 Civ. 3006-CSH

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

This case concerns unspecified phone calls plaintiff made within Canada and from Canada to the United States. Plaintiff, a New York resident, directed the Canadian telephone company to bill the cost of these calls to his American telephone account with defendant New York Telephone. It is alleged that the Canadian company billed defendant for these calls in Canadian dollars and that defendant then billed plaintiff for the calls in the same amount of American dollars. At the time the exchange rate of the two dollars was not one-for-one, with the American dollar the stronger currency. As a result, New York Telephone would have billed plaintiff for, in effect, a higher price than it was charged. It allegedly pocketed the difference.

Plaintiff filed this as yet uncertified class action in New York Supreme Court to recover the difference in value between the Canadian and American prices, alleging fraud and money had and received. Defendant removed the action to this Court pursuant to 28 U.S.C. %1441, alleging subject matter jurisdiction under two federal question statutes, 28 U.S.C. §§1331 and 1337. Following some discovery, defendant has moved to dismiss under Rules 9(b) and 12(c), Fed.R.Civ.P. Plaintiff cross-moves for remand pursuant to 28 U.S.C. §1447(c) or alternatively for summary judgment.

I.

Because the motion for remand goes directly to the Court's power to adjudicate this dispute, I address it first. Removal was proper only if subject matter jurisdiction exists in federal court. 28 U.S.C. §1441. Defendant contends that jurisdiction can be found under the federal question statute, 28 U.S.C. §1331. Section 1331 grants a federal forum to lawsuits "arising under" federal law. Plaintiff contends that his common law causes of action do not so arise.

The leading case is *Ivy Broadcasting Co. v. American Telegraph and Telephone Co.*, 391 F.2d 486 (2d Cir. 1968). Plaintiff in *Ivy* operated radio stations. It contracted with the telephone company to provide communications service in connection with the broadcast of Syracuse University football games and New York political conventions. The telephone company allegedly provided inadequate service, ruining plaintiff's broadcasts. Plaintiff sued, stating causes of action for negligence and breach of contract. The district court *sua sponte* dismissed the complaint for want of subject matter jurisdiction, reasoning that the claims arose not under federal law but under the common law of New York State.

The Court of Appeals reversed. The court acknowledged that the remedy which the plaintiff sought was not one granted by federal statutory law, since the acts alleged were not violations of specific provisions of the Communications Act of 1934 ("the Act"), 47 U.S.C. §§151-609, a statute which provides a comprehensive scheme of regulation for carriers such as the telephone company. However, the very comprehensiveness of the regulatory scheme established by the Act led the court to consider whether Congress intended to displace state law with federal common law in the governance of contracts involving communications carriers. After considering a number of United States Supreme Court cases in which a uniform federal rule was held to displace state law in actions involving the provision of telegraphic services, the court held that:

> . . . questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law . . . [T]he states are precluded from acting in this area. Where neither the Communications Act itself nor the tariffs filed pursuant to the Act deals with a particular question, the courts are to apply a uniform rule of federal common law.

391 F.2d at 491. The application of federal common law was held to create federal subject matter jurisdiction. *Id.* at 493. The Supreme Court has since concurred in the latter conclusion. *Illinois v. City of Milwaukee,* 406 U.S. 91, 100 (1972) (pollution of interstate or navigable waters).

Ivy is controlling here and creates federal subject matter jurisdiction. The holding of *Ivy* is both broad and absolute—"questions concerning the duties, charges and liabilities of . . . telephone companies with respect to interstate communications service are to be governed solely

by federal law." 391 F.2d at 491. This case involves the charges for the provision of communications service. That it is framed in terms of a tort is irrelevant—the *Ivy* plaintiff, too, was pleading a tort. The only potentially significant difference between this action and *Ivy* is that this action concerns international and wholly foreign service. However, the regulatory scheme of the Act which persuaded the *Ivy* court to apply federal common law extends not only to the provision of interstate but also of foreign communication. Section 201 of the Act, 47 U.S.C. §201, for eample, which governs "service and charges," applies to "every common carrier engaged in interstate and foreign communication." Thus the reasoning which led the Court of Appeals to apply federal common law to disputes over interstate service extends equally to disputes over foreign communication. Both are within the Act's regulatory scheme. As a result, federal jurisdiction exists, and whatever claims plaintiff is raising are governed by federal, not state, common law.

Plaintiff argues that because rates for intra-Canada calls are not subject to regulation by the Act, *Ivy* is inapplicable. The specific rates for intra-Canada calls, however, are not at issue here. Plaintiff's concern is with New York Telephone's method of billing for these calls, not the actual price of the calls. Section 201(b) of the Act requires "all charges" in connection with the provision of interstate and foreign communications services to be "just and reasonable." This would appear to include the provision of billing services for foreign calls. In addition, the type of contract under which defendant provides this billing service for the Canadian telephone company must be filed with the Federal Communications Commission ("FCC") pursuant to 47 U.S.C. §211, *see also* 47 C.F.R. §43.51(a)(1), which may veto such contracts if they are "contrary to the public interest." 47 U.S.C. §201(b).

Plainly, billing for intra-Canada calls is subject to regulation under the Act. Plaintiff's objection is meritless. Removal was proper.

II.

The parties have cross-moved for judgment. Defendant styles its motion as one pursuant to Rule 12(c), Fed.R.Civ.P., but because it relies upon factual matters outside the pleadings which contradict the allegations of the complaint, it is more appropriately treated as a motion for summary judgment pursuant to Rule 56. Because plaintiff has himself filed a motion under Rule 56, I find no prejudice in treating both of the cross-motions as motions for summary judgment.

Based on the evidence submitted by defendant, it appears that the true nature of the transactions between Canadian and American telephone companies is quite different from that stated in the complaint. The complaint asserts that whenever plaintiff made an intra-Canadian or international call from within Canada, the Canadian company would bill New York Telephone in Canadian dollars while New York Telephone would in turn bill plaintiff in stronger American dollars. New York Telephone allegedly kept the difference in value between the two currencies, which plaintiff alleges at the time of his calls amounted to 15 percent of their price.

That is not the way it works. Not surprisingly, the true relationship between the two telephone companies and their customers is more complex.

According to the affidavit of Mary Stachow, an employee of defendant who has work experience in the collection of revenues from international and foreign

telephone calls, distribution of revenue collected in the United States to pay for intra-Canadian and Canada/United States telephone calls is (or was at the time of the incidents alleged) governed by a written agreement dated December 21, 1971.

At the time of the incidents alleged in this lawsuit, the Bell System was still a unified monopoly. New York Telephone handled plaintiff's billing and local telephone service, but it was American Telephone and Telegraph Co. which actually settled accounts concerning international and foreign service. The agreement was signed by AT&T and several Canadian telephone companies, and AT&T acted as defendant's agent in dealing with the Canadian telephone companies in all the transactions described below. The Canadian companies themselves formed a corresponding consortium to deal with AT&T.

The agreement establishes a uniform dollar rate for international calls. If payment for the call is to be collected in the United States, the price of the call is to be quoted and collected in American dollars; if the debt is to be collected in Canada, Canadian dollars are quoted and collected.[1] Agreement, at 4, ¶5. The companies established in the agreement a system for dividing the revenues thus collected and agreed to settle accounts monthly. Any payments made to settle accounts are to be made half in "the equivalent of" Canadian and half in "the equivalent of" American dollars. Although the point is not entirely clear, I take this to mean that half of the payment is made in each currency, with the amounts of each currency adjusted to account for their relative values.

The international phone rates specified in the agreement have been filed by defendant with the FCC as a tariff. Not only is defendant required by the tariff to col-

lect these charges, it is required to do so in American dollars:

> In connection with service from points outside the United States . . . to points within the United States, when charges to Customers are made by Telephone Companies in the United States [in the tariff] . . . in United States dollars, apply to all calls.

FCC Tariff No. 263, Regulation No. 2.4.6. (March 26, 1979).

Thus it appears that with regard to calls made between the United States and Canada, both FCC regulations and defendant's contractual commitments require it to apply rates calculated in American dollars. Those are also the rates which are quoted to Americans in Canada, in American dollars.[2] The simplistic "billed in Canadian dollars, paid in American dollars" scheme hypothesized by plaintiff in his complaint appears to have no basis in reality.

By its terms the agreement applies only to international calls. However, according to the Reid and Stachow affidavits, filed by defendant in support of its motion, billing for intra-Canadian calls is also governed by the agreement. The price for intra-Canadian service is not, of course, regulated by the FCC. Rather, it is governed by tariffs filed with Canadian regulatory agencies. According to the affidavits, New York Telephone acts essentially as an agent for collection of payment for the calls. A Canadian company reports to defendant the price, in American dollars, which is to be charged for the intra-Canada call; defendant bills its customer that amount (again in American dollars); and defendant then turns that money over to the Canadian company as part of the agreement's monthly settlement process. If the agreement is adhered

to, Americans are quoted rates for calls in American dollars, and the monthly settlement is made half in the equivalent of Canadian and half in the equivalent of American dollars. It is uncertain whether the intra-Canadian phone rates reported to the American companies are adjusted for relative exchange rates or are, like international rates, the same in either dollar. It is also unclear whether defendant turns over all of the money it collects or whether, contrarily, it is paid a fee for collecting payments for intra-Canadian calls.

I have one reservation about defendant's account of its billing method for intra-Canadian calls. As far as I can see, nowhere in the agreement, which appears to deal solely with international calls, are intra-Canadian calls mentioned. Certainly the scheme outlined by Reid and Stachow is not detailed in it. Nevertheless, in the absence of any contrary evidence I accept the sworn testimony of Reid and Stachow, the latter of whom worked in the division of New York Telephone responsible for handling these transactions, that collection and payment of bills for intra-Canada telephone calls are conducted in accordance with the terms of the agreement.

Plaintiff has not submitted any contrary evidence. One would expect that plaintiff, having moved for summary judgment, would have submitted some proof to back up his allegations—indeed, to prove that there was no dispute that his allegations were true. In his memorandum of law, he states as a proposition of fact that he was quoted a price in Canadian dollars but billed in the same amount of American dollars. This is, of course, a somewhat different claim than the one he pleaded in his complaint. Even this claim, however, is supported by no affidavit of plaintiff, as one might expect when an essential element of his claim is that prices were quoted to him in a particular manner.

Instead, plaintiff cites to three other sources of evidentiary support. The first is an excerpt from a deposition of Mary Stachow, the same individual who filed an affidavit in support of defendant's motion. At her deposition, Stachow was asked whether New York Telephone was billed in Canadian dollars for intra-Canadian calls. The question in context is actually somewhat ambiguous. It could be taken as asking the question left open above—whether intra-Canadian tariffs are adjusted to account for the exchange rate when billed in the United States. In any event, her response was, "I'm not sure. They would tell us to bill $5.00 and we would bill $5.00." This plainly gives no support to plaintiff's position. The second purported source of evidence is a response by defendant to a request to admit. The request is for defendant to admit that Canadian telephone companies billed it in Canadian dollars for the type of calls at issue here. Defendant denied this. I am at a loss to see how this supports plaintiff. Finally plaintiff refers to a letter dated November 8, 1978 from a Mrs. L. Eng to a Mr. Herbert Deutsch, written on New York Telephone stationery. This letter—which in any event is insufficient to create an issue of fact, being unsworn, unauthenticated hearsay—states only that rates for intra-Canada calls are set by Canadian authorities. This, too, gives no comfort to plaintiff. In short, plaintiff has presented no factual support for his claims.[3] Defendant's version of the facts stands undisputed.

Based on defendant's evidence, it appears that the scheme for billing international and intra-Canada calls in the United States is quite different from that pleaded in the complaint. Canadian companies never "bill" defendant for international calls. The price for a Canada-United States call may be determined from a pre-set dollar tariff. If the call is to be billed to the individual customer

in the United States, defendant figures the price from the tariff and charges in American dollars. If it is to be billed in Canada, a Canadian company calculates the charges and bills the same number of Canadian dollars. Once a month the two nations' telephone companies split up their respetive receipts according to a predetermined formula.

Nor does a Canadian company "bill" defendant for intra-Canada calls in Canadian dollars. If a customer requests that such a call be billed to an American account, the Canadian company reports to defendant the occurrence of the call, the customer to whom the call is to be charged, and the price for the call. The price reported to defendant is calculated according to Canadian tariffs and is stated in (and is to be billed in) American dollars. Whether the price is adjusted for currency differences or is, like the rates for international calls, stated in the same number of Canadian and American dollars, is unclear. I infer from defendant's conspicuous silence on the question, however, that no adjustment is made. Defendant bills all such calls and, once a month, turns over what it collects to the Canadian company. Whether defendant keeps a portion of the proceeds as the equivalent of a "service charge" is unclear.

Thus, defendant does not systematically skim off the difference between the Canadian and American price of foreign and international calls billed in the United States. It does appear to be true, however, that the real price of such calls to an American customer varies depending upon whether he or she pays for them immediately, in Canada, or has them charged to an account maintained in the United States. The difference in real price is equivalent to the difference in value of the Canadian and American dollars. It remains to consider the legal consequences of this state of affairs.

III.

Defendant raises the "filed tariff" doctrine as a complete defense to the claims regarding the Canada-United States calls. This doctrine was first pronounced by the Supreme Court in an anti-trust action entitled *Keogh v. Chicago & Northwestern Railway Co.,* 260 U.S. 156 (1922). Plaintiff in *Keogh* alleged that the defendants had concocted rail shipping rates in violation of the Sherman Act. The rates were charged under a tariff filed with and approved by the Interstate Commerce Commission. In dismissing the action, Justice Brandeis essentially held that a shipper may not be held liable for damages in the nature of an overcharge when charging an approved tariff:

> Section 7 of the Anti-Trust Act gives a right of action to one who has been "injured in his business or property." Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

260 U.S. at 163. According to the Second Circuit, "[t]he rationale [for the doctrine] is that the regulatory agency determines the legal rate and the utility must collect it while it is in effect." *City of Groton v. Connecticut Light & Power Co.,* 662 F.2d 921, 929 (2d Cir. 1981).[4]

I conclude that "filed tariff" doctrine bars any recovery by plaintiff for the cost of Canada-United States calls under a contractual theory such as money had and received. Money had and received is a somewhat nebulous doctrine. It is sometimes spoken of as *quasi*-contractual in nature, *see Miller v. Schloss,* 218 U.S. 400, 406, 113 N.E.

337)1916), and is grounded in equity. Ordinarily it is employed when money which in good conscience should belong to one party has somehow found its way into the hands of another. *See Northern Trust Co. v. Chase Manhattan Bank, N.A.*, 582 F.Supp. 1380, 1384 (S.D.N.Y. 1984). It may be used, for example, to recover money which has been paid to one on the understanding that it be paid to another when the second payment is not or cannot be made. *See Unger v. Travel Arrangements, Inc.*, 25 A.D.2d 40, 266 N.Y.S.2d 715, 720-721 (1966). Reflecting its general nature, the elements of the cause of action are stated broadly. The Second Circuit recently formulated them thus: 1) receipt by defendant of money belonging to plaintiff, 2) a benefit to defendant from receipt of the money, and 3) a finding that defendant should not equitably be permitted to keep the money. *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, N.A.*, 731 F.2d 112, 125 (2d Cir. 1984).

The filed tariff doctrine is relevant to the third element. In order to recover, plaintiff must show that he has a superior equitable claim on the money at issue. The existence of a filed tariff essentially neuters any claim plaintiff might have that the utility's adherence to the rate is improper or inequitable. The filed tariff doctrine defines such a rate as wholly proper. In this case, the filed tariff authorized defendant to charge the specified rates in American dollars. This is precisely what it did. So long as defendant provided the requisite service, it was lawfully entitled by those tariffs to charge those rates. The filed tariff doctrine thus insulates defendant from any equitable claim that its charging these rates was improper.[5]

Because the rates for intra-Canada calls are set by Canadian tariffs, defendant may not invoke the filed tariff doctrine to protect itself from liability for those calls. Nevertheless, it seems likely that a claim for money had

and received concerning the intra-Canada calls will be unsuccessful. First, it is clear that if, as defendant seems to claim, rates for intra-Canada calls were quoted to plaintiff in American dollars, equity would not demand any refund to plaintiff. The quote constituted in essence an offer and plaintiff's making the call contractually committed him to pay the tariff rate in American dollars. Second, if the rate was quoted by a Canadian company in Canadian dollars, once defendant surrendered all of the money collected for the call to the Canadian company defendant was released from liability. In this circumstance, defendant was acting as a billing agent for the Canadian company. Once defendant paid its principal the entire sum collected, it was relieved of any liability to plaintiff under the doctrine of money had and received. *Unger, supra,* 266 N.Y.S.2d at 721. Plaintiff's remedy would lie in Canada. If plaintiff was quoted in Canadian dollars, he may, however, be able to regain any service charge which defendant retained. *See Unger, supra,* 266 N.Y.S.2d at 722 (defendant, essentially a broker, forced to return retained commission on unconsummated sale to plaintiff but released from liability on the remaining sale price because defendant had turned over remainder to seller).

IV.

Claims of fraud are different. The filed tariff doctrine is designed to protect utilities charging filed rates for lawfully provided service. It is of no help to a defendant which fraudulently induces a plaintiff to pay a filed rate or which otherwise exacts payment by fraud. There is nothing in the policy underpinnings of the doctrine which would cause it to protect a defendant which unlawfully exacts payment, even at a lawful rate.

Plaintiff, however, has yet to state a viable claim for fraud. I find defendant's motion to dismiss for failure to plead fraud with particularity wholly justified. Rule 9(b), Fed.R.Civ.P. A fraud plaintiff is required to state in his or her complaint not only the specific fraudulent misrepresentations alleged but also the time when those misrepresentations occurred and the circumstances of their occurrence which give rise to an inference of fraud. *Ross v. A.H. Robins Co.*, 607 F.2d 545, 558 (2d Cir. 1979). Plaintiff has not even pleaded any misrepresentations by defendant, let alone the time and circumstances of their occurrence. He simply states (falsely, it appears) that defendant keeps the difference between the American and Canadian price for these calls and that this constitutes fraud. Such conclusory pleading is wholly inadequate.

At one point in his memorandum of law plaintiff claims that defendant quoted him a price in Canadian dollars and charged him in American dollars. If plaintiff wishes actually to plead this, rather than merely to have his lawyers ineffectually assert it in a memorandum of law, he must state, at a minimum, the time at which this misrepresentation was made to him, the person who made it, and the circumstances which would cause one to infer a fraudulent intent from it.

At other points in his memorandum of law plaintiff seems to argue that it was defendant's failure to inform him of the option of paying immediately in Canadian dollars which constituted the fraud he wishes to allege. If this is so, he must allege the occasions on which this material information was withheld from him, the circumstances which created in defendant a duty to disclose the information, intent, deception, reliance, and damages. *See Aaron Ferer & Sons, supra,* 731 F.2d at 123; *Kaplan v. ITT-U.S. Transmission Systems, Inc.*, 589 F.Supp. 729, 736 (E.D.N.Y. 1984). Because plaintiff's fraud pleading is

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inadequate, I dismiss the claims without prejudice, and with leave to replead.

V.

The parties extensively briefed the issue of primary jurisdiction. Defendant argues that this action should be stayed pending referral of plaintiff's claims to the FCC. I find it unnecessary to discuss the issue in the detail which the parties devoted to it. Judge Glasser covered the same ground in comprehensive fashion in his recent decision in *Kaplan v. ITT-U.S. Transmission Systems, Inc., supra,* 589 F.Supp. at 733-736. For the reasons stated therein, I conclude that application of the doctrine of primary jurisdiction is inappropriate to the common law causes of action pleaded in this case. Plaintiff is entitled to an immediate judicial forum. I deny defendant's motion to stay the action on this ground.

Finally, defendant also raises a non-dispositive statute of limitations argument, asserting that recovery for all calls made more than two years prior to the filing of the lawsuit is barred on grounds of the two-year statute of limitations found in 47 U.S.C. §415(b). Section 415(b) by its express terms bars only complaints filed with the FCC more than two years after accrual of a claim. However, an extensive analysis of the statutory history led the court in *Ward v. Northern Ohio Telephone Co.,* 251 F.Supp. 606 (N.D. Ohio 1966), *aff'd. per curiam,* 381 F.2d 16 (6th Cir. 1967) to conclude that §415(b) was also intended to apply to suits filed in district court. The *Ward* decision has been unanimously adopted by those few courts which have considered the issue in the intervening years. *See Pavlak v. Church,* 727 F.2d 1425 (9th Cir. 1984); *Swarthout v. Michigan Bell Telephone Co.,* 504 F.2d 748 (6th Cir. 1974); *Cole v. Kelley,* 438 F.Supp. 129 (C.D.Cal. 1977);

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Hofler v. American Telephone and Telegraph Co., 328 F.Supp. 893 (E.D.Va. 1971).

However, because of the difficulty which sometimes arises in determining when a cause of action for fraud accrues, I will not hold at this time that recovery for all calls made more than two years before the filing of the action is necessarily barred. I do note, however, that a two year statute of limitations is apparently applicable. Application of the statute to these facts awaits further fleshing out of the details of the fraud.

VI.

In conclusion, defendant's motions to dismiss this action entirely, to stay it, or to refer it to the FCC are denied, as is plaintiff's motion for summary judgment.

Summary judgment is granted to defendant on the claim for money had and received regarding international (Canada-United States) telephone calls.

Defendant's motion to dismiss the fraud claims for failure to comply with Rule 9(b), Fed.R.Civ.P., is granted. Plaintiff is granted twenty days' leave from the date of filing of this decision to file an amended complaint spelling out his fraud claim in proper detail. In order that it may be determined whether plaintiff states a viable claim for money had and received concerning the intra-Canada calls, plaintiff is directed to replead this claim, stating when, by whom, and in what currency the intra-Canadian calls were quoted to him, and whether he informed the person making the rate quote that he intended to bill the call to his New York account. If no amended pleading is submitted within that time, it will be assumed that plaintiff cannot plead viable claims, and the entire action will be dismissed with prejudice.

BEST AVAIL

In light of the apparently baseless nature of many of the factual allegations in plaintiff's initial complaint, I find it appropriate to remind him and his lawyers of the requirement of Rule 11, Fed.R.Civ.P., that every attorney who signs a pleading does so only upon finding "after reasonable inquiry [that the pleading] is well grounded in fact and is warranted by existing law." Imposition of sanctions is mandatory when Rule 11 is violated.

I find no merit in the remainder of defendant's arguments.

It is SO ORDERED.

Dated: New York, New York
May 2, 1985

s/ Charles S. Haight, Jr.
CHARLES S. HAIGHT, JR.
U.S.D.J.

FOOTNOTES

1. In what appears to be an effort to mislead the Court as to the nature of the agreement, plaintiff in his initial memorandum of law, at 7, quotes only the second half of the relevant sentence in the agreement, which reads in full, "For [telephone service] the charges for which are payable in Canada, the rates shall be quoted to and payable by the customer in Canadian currency." Of course, by leaving out the initial phrase, "the charges for which are payable in Canada," plaintiff seeks to create the impression that the clause concerning quotation in Canadian currency somehow applies to his situation. It does not, and it is worth noting that his complaint contains no allegation that he was ever quoted prices in Canadian cur-

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rency. I do not appreciate plaintiff's seeming attempt to create the contrary impression through partial quotation.

2. As noted in footnote 2, *supra,* plaintiff does not plead that he was ever quoted a price in Canadian dollars. Even if he was, however, the misrepresentation would appear to have been committed by a Canadian telephone company, not defendant.

3. There is really no mystery in plaintiff's failure to submit an affidavit alleging that misrepresentations had been made to him individually. Plaintiff filed this action as a class action and will presumably seek to have himself declared a representative class plaintiff. The propriety of class treatment depends in part upon whether the fraud alleged was systematic or aberrational. It is no doubt plaintiff's hope to demonstrate that it was standard practice for defendnat to quote call prices in Canadian dollars and bill in American dollars. Under such circumstances, class treatment would appear reasonable. If, on the other hand, quotation in American dollars was the norm and plaintiff's claimed experience was aberrational, class treatment is more dubious.

Neither party has submitted any evidence of defendant's standard practice, but the FCC tariff and defendant's contractual commitments require it to quote prices in American dollars for calls which are to be billed in the United States. If its standard practice deviates from this—and I hasten to add there is absolutely no evidence that this is so—a serious charge of fraud could be made out.

4. The filed tariff doctrine, however, does not immunize a regulated utility from all liability. For example, under certain circumstances it does not shield a utility from liability when charging an ultimately disapproved tariff, *id.,* at 929; *Litton Systems, Inc. v. American*

Telephone & Telegraph, Inc., 700 F.2d 785, 820 (2d Cir. 1983), and it provides no protection from lawsuits not directly connected with rates. *See, e.g., Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973).

5. In addition to the filed tariff doctrine, at this point in its papers defendant raises the issue of exhaustion of administrative remedies. It would be proper to require exhaustion only if plaintiff were challenging the reasonableness of defendant's tariff rate or of its practice of billing in American dollars without adjusting for the value of the currency. I do not read the complaint as making such a challenge, although the question is complicated by the mistaken allegations in the complaint. Plaintiff is not complaining about the existence or propriety of the tariff and the practice of charging in unconverted dollars *per se.* He is complaining about defendant's failure to tell him that he had the option of saving money by paying for his calls in Canada. Consequently, it is not the practice which plaintiff challenges but defendant's failure to make him aware of it. The case resembles *Nader v. Allegheny Airlines, Inc.*, 445 F.Supp. 168 (D.D.C. 1978). No exhaustion is necessary.

APPENDIX C—VERIFIED PETITION FOR REMOVAL FILED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT FOR
SOUTHERN DISTRICT OF NEW YORK

HAROLD NORDLICHT, on behalf of himself and all others similarly situated,

Plaintiff,

against

NEW YORK TELEPHONE COMPANY,

Defendant.

VERIFIED PETITION FOR REMOVAL

To the Judges of the United States District Court for the Southern District of New York:

The petition of the New York Telephone Company (hereinafter sometimes "Petitioner" or the "Telephone Company") respectfully shows:

1. On April 12, 1982, an action was commenced against the Petitioner in the Supreme Court of the State of New York, County of New York, entitled *"Harold Nordlicht, on behalf of himself and all others similarly situated, plaintiff, against New York Telephone Company, defendant,"* by service upon petitioner of a summons and complaint, a copy of which is annexed hereto. No further proceedings have been had herein.

2. The above-described action is a civil action of which this court has original jurisdiction under the provi-

sions of 28 U.S.C. §1331 (a civil action arising under the Constitution, laws or treaties of the United States) and §1337 (a civil action arising under an Act of Congress regulating commerce) and is one which may be removed to this court by Petitioner pursuant to 28 U.S.C. §1441.

3. Petitioner is a telecommunications common carrier offering, *inter alia,* telecommunications services between points in New York State and points in foreign countries and, as such, is subject to the provisions of the Communications Act of 1934, as amended, 47 U.S.C. §§151-609 ("Act"), and the jurisdiction of the Federal Communications Commission ("FCC"), the agency of the United States charged with responsibility for regulating interstate and foreign telecommunications services.

4. Plaintiff's claim is that from time to time, while in Canada, he made telephone calls from points in Canada to points in the United States and between points in Canada and requested that such calls be charged to a telephone number in New York State assigned to plaintiff by the Telephone Company. He alleges further that the Telephone Company billed the charges for such calls in U.S. dollar amounts, and claims that those amounts in U.S. dollars should have been reduced by a factor of 15% to reflect an alleged 15% lower value of Canadian dollars. Plaintiff, as noted, purports to sue on his own behalf and on behalf of others similarly situated.

5. Petitioner files herewith a bond with a good and sufficient surety conditioned, as provided by 28 U.S.C. §1446(d), that it will pay costs and disbursements incurred by reason of the instant removal proceedings should it be determined that this action is not removable or is improperly removed. A copy of said bond is annexed hereto.

WHEREFORE, Petitioner prays that the above action now pending against it in Supreme Court of the State of New York, New York County, be removed therefrom to this Court.

Dated: April 30, 1982

HAROLD S. LEVY
GERALD E. MURRAY
WALTER C. REID
BY s/ Walter C. Reid
WALTER C. REID
Attorneys for Petitioner
New York Telephone Company
1095 Avenue of the Americas
New York, New York 10036
(212) 395-6114

APPENDIX D—ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAROLD NORDLICHT, etc.,

Plaintiff,

-against-

NEW YORK TELEPHONE COMPANY,

Defendant.

---

82 Civ. 3006-CSH
ORDER

Plaintiff's motion for reargument is denied. Rather than setting out "concisely the matters or controlling decisions which counsel believes the court has overlooked," as required by Rule 3(j) of the Civil Rules of this Court, plaintiff's lengthy memorandum for the most part rehashes his original arguments. There is no mention of arguments, facts, or case law which I overlooked. To the extent that he has refined the arguments in light of my opinion, I find the refinements unpersuasive.

Plaintiff is directed to file an amended complaint within twenty days, in accordance with the terms of my prior opinion, at 20-21.

It is SO ORDERED.

Dated: New York, New York
September 9, 1985

s/ Charles S. Haight, Jr.
CHARLES S. HAIGHT, JR.
U.S.D.J.

APPENDIX E—ORDER DISMISSING ACTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAROLD NORDLICHT, etc.,

Plaintiff,

against

NEW YORK TELEPHONE COMPANY,

Defendant.

---

82 Civ. 3006 (CSH)

ORDER

This cause came on to be heard on the Court's own motion, to dismiss the action for failure of plaintiff to comply with the Order of this Court made on September 9, 1985 directing plaintiff to file and serve an amended complaint within 20 days in accordance with the terms of this Court's May 2, 1985 Memorandum Opinion and Order; and it appearing to the Court that plaintiff has failed to file and serve an amended complaint as ordered, it is

ORDERED that this action be, and the same is hereby dismissed with prejudice.

Dated: February 21, 1986

s/ Charles S. Haight, Jr.
U.S.D.J.

APPENDIX F—VERIFIED COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

HAROLD NORDLICH, on behalf of himself and all others similarly situated,

Plaintiff,

against

NEW YORK TELEPHONE COMPANY,

Defendant.

VERIFIED COMPLAINT — CLASS ACTION

Plaintiff, by his attorney HERBERT I. DEUTSCH, P.C., alleges as follows:

1. Plaintiff is a citizen and resident of the State of New York.

2. Defendant New York Telephone Company is a corporation engaged, *inter alia,* in the business of providing telephone service. Upon information and belief, defendant's principal place of business is located within the State of New York.

CLASS ACTION ALLEGATIONS

3. Plaintiff brings this action as a class action on behalf of himself and all other users of the telephone service provided by defendant for the period January 1, 1973 to the present.

4. This action is a class action properly maintainable under the provisions of the C.P.L.R.

5. The size of the class is, upon information and belief, in excess of 6,000 people and joinder is therefore impractical.

6. Plaintiff's claims are typical of the claims of the class. Plaintiff is not antagonistic to the class and will fairly and adequately represent the interests of the class.

7. All class members have an identical interest in seeking damages for the misconduct, fraud and illegal acts alleged herein. Common questions of law and fact predominate over individual questions and, therefore, a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

8. Common questions of law and fact include:

(a) whether there was a plan and scheme to defraud the public;

(b) the liability of the defendant to the class; and

(c) the measure of damages.

9. No exceptional difficulties are likely to be encountered in the prosecution of this action as a class action.

10. No other class or representative action is pending with regard to this controversy.

ALLEGATIONS COMMON TO ALL COUNTS

11. Upon information and belief, defendant engaged in a plan and scheme to defraud the members of the class.

12. The plan and scheme operated as follows: when any subscriber to the telephone services provided by defendant made a phone call either between Canadian cities or from a Canadian city to the United States, and charged the same to his United States telephone number, the Canadian telephone company would bill the defendant in Canadian dollars.

13. In turn, the defendant would bill the plaintiff subscriber in United States dollars. No adjustment for the differential in currency value between Canadian currency and United States currency was made (e.g., a Canadian charge of $2.00 would appear on the subscriber's bill as a United States charge of $2.00).

14. The failure to provide for currency adjustment resulted in an overcharge of approximately fifteen (15%) percent on each dollar billed.

15. From time to time the plaintiff, while in Canada, made phone calls between Canadian cities and/or phone calls from Canada to the United States and had such calls charged to his home phone number. The Canadian telephone company billed the defendant in Canadian dollars for these charges and the defendant in turn, without adjustment, billed the plaintiff the same amount, resulting in overcharges to the plaintiff of approximately 15%.

16. Despite due demand, the defendant has failed and refused to adjust plaintiff's bill and/or reimburse him for overcharges.

COUNT I

Plaintiff repeats and realleges the preceding

paragraphs as if fully set forth, and further alleges:

17. The foregoing actions constitute common law fraud.

COUNT II

Plaintiff repeats and realleges the preceding paragraphs as if fully set forth, and further alleges:

18. The foregoing actions constitute a claim for money had and received.

WHEREFORE, plaintiff demands judgment against the defendant as follows:

(a) finding and determining that this action is a proper class action;

(b) a permanent injunction restraining the defendant from engaging in such practices and requiring the defendant to convert Canadian charges to United States dollars on an adjusted basis;

(c) awarding a credit to each class member so overcharged in an amount equal to the overcharge;

(d) punitive damages in an amount equal to three times the overcharge;

(e) awarding plaintiff and the class the reasonable expenses of this action including costs, disbursements, reasonable attorneys' fees, reasonable accountants' fees, and reasonable expert witness fees; and

(f) awarding plaintiff and the class such other and further relief as may be just and proper.

HERBERT I. DEUTSCH, P.C.
Attorney for Plaintiff
150 East 58th Street
New York, New York 10155
(212) 486-0535

APPENDIX G—AMENDED ANSWER

UNITED STATES DISTRICT COURT FOR
SOUTHERN DISTRICT OF NEW YORK

HAROLD NORDLICHT, on behalf of himself and all others similarly situated,

Plaintiff,

against

NEW YORK TELEPHONE COMPANY,

Defendant.

AMENDED ANSWER 82-Civ-3006 (CSH)

The defendant, New York Telephone Company, by its attorneys, Harold S. Levy, Gerald E. Murray and Walter C. Reid, answers the complaint of the plaintiff as follows:

First Defense

1. Denies knowledge or information sufficient to form a belief as to the allegations of paragraphs "1", "3", "4", "5", "6", "7", "8", "9" and "10" except admits that this action purports to be a class action instituted under the statutes specified in the complaint.

2. Admits paragraph "2".

3. Denies each and every allegation of paragraphs "11", "12", "13", "14", "15" and "16" of the complaint except admits that its bills for charges are payable in United States dollars and denies that it has knowledge or information sufficient to form a belief as to the allegations of the first sentence of paragraph "15."

4. With respect to the allegations of paragraph "17" of the complaint, repeats and realieges the allegations of paragraphs "1" through "5" of this answer as if fully set forth herein, and denies that the complaint sets forth a claim for common law fraud.

5. With respect to the allegations of paragraph "18" of the complaint, repeats and realleges the allegations of paragraphs "1" through "5" of this answer as if fully set forth herein, and denies that the complaint states a common law claim for money had and received.

Second Defense

6. The complaint fails to state a claim upon which relief may be granted.

Third Defense

7. This Court is without jurisdiction of the subject matter of the causes of action alleged in the complaint.

Fourth Defense

8. Plaintiff's claim or claims are barred, in whole or in part, by the applicable statute of limitations or by laches.

Fifth Defense

9. Plaintiff's claim or claims relate to matters peculiarly suitable to resolution by the Federal Communications Commission ("FCC") and this Court should stay this action under the doctrine of primary jurisdiction.

Sixth Defense

10. Plaintiff seeks recovery under state common law theories for activities lawfully engaged in by defendant, in whole or in part, under the tariffs, rules and regulations of the FCC, and particularly under FCC Tariff No. 263. The duties, charges and liability of the defendant with respect to foreign communications service are governed by federal law, both pursuant to the Communications Act of 1934, as amended, 47 U.S.C. §§151-609, and under the provisions of federal common law, and the states are by virtue of that fact precluded from applying their common law remedies and from acting in this area.

Seventh Defense

11. Plaintiff has failed to exhaust his administrative remedies.

Eighth Defense

12. Plaintiff has failed to set forth the circumstances constituting common law fraud with particularity.

WHEREFORE, defendant demands judgment in its favor dismissing the complaint, awarding it the costs and disbursements of this action, and for such other and further relief as may be just and proper.

Dated: New York, New York
June 2, 1982

HAROLD S. LEVY
GERALD E. MURRAY
WALTER C. REID
By s/ Walter C. Reid
Walter C. Reid
Attorneys for Defendant
New York Telephone Company
1095 Avenue of the Americas
New York, New York 10036
(212) 395-6114

APPENDIX H—EXCERPT FROM DEPOSITION OF MARY STACHOW

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAROLD NORDLICHT, on behalf of himself and all others similarly situated,

Plaintiff,

-against-

NEW YORK TELEPHONE COMPANY,

Defendant.

---

150 East 58th Street
New York, New York
June 8, 1982
10:00 A.M.

Deposition of the Defendant, by MARY STACHOW.

Michael Scribano, Reporter

two telephone companies in arriving at that bill and settlement?

A. Yes. The Canadian company would record the call, record the time the call is made, the duration of the call, the points it was made between. They would rate the call according to their tariffs. And they would then forward the charge—they would tell us how much to bill the customer, and we would do the billing.

Q. When you say, "rate the call," that means put a price on it; is that right?

A. That's right.

Q. So, for argument's sake, if they determined under their tariff schedules say for a hypothetical now between Toronto and Montreal it was $5.00 Canadian, they would bill you in Canadian dollars?

A. I'm not sure. They would tell us to bill $5.00 and we would bill $5.00. Whether that's Canadian or U.S., I'm really not sure at this point.

Q. And then when you remit payment to Canada, what do you remit payment in?

A. Well, actually New York, per se, does not remit the payment. We work through Long Lines.

Q. Would you explain that, please?

A. Yes. We have what we calla division of ***

APPENDIX I—LETTER DATED NOV. 8, 1978

[Stationery of New York Telephone, 575 Lexington Ave., New York, NY 10022 Phone (212) 888-9950]

November 8, 1978

Mr. Herbert Deutsch
c/o Gerwin & Ehrenclou
150 East 58 Street
30 Flr
New York, NY 10022

Dear Sir:

As requested I am writing in response to your complaint to the Public Service Commission regarding billing of a call made in Canada to another point in Canada and charged to a telephone account in New York State. We have verified that if your client places a call in Canada to another point in Canada, the originating location of the call establishes the charges and rates a ticket for billing according to local Canadian tariffs, and the New York Telephone Company bills according to the ticket.

If your client would like to inquire further regarding the rates, we suggest that he direct his inquiries to the Telephone Company in the city in Canada where he originally placed his call, since we can offer no further information without any additional details of the call from you.

I trust that the above information will be helpful to you.

Sincerely,
s/ L. Eng
Mrs. L. Eng
Supervisor

Supreme Court, U.S.
FILED
DEC 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-838

In The
Supreme Court of the United States
October Term, 1986

HAROLD NORDLICHT, on behalf of himself and all others similarly situated,

Petitioner,

against

NEW YORK TELEPHONE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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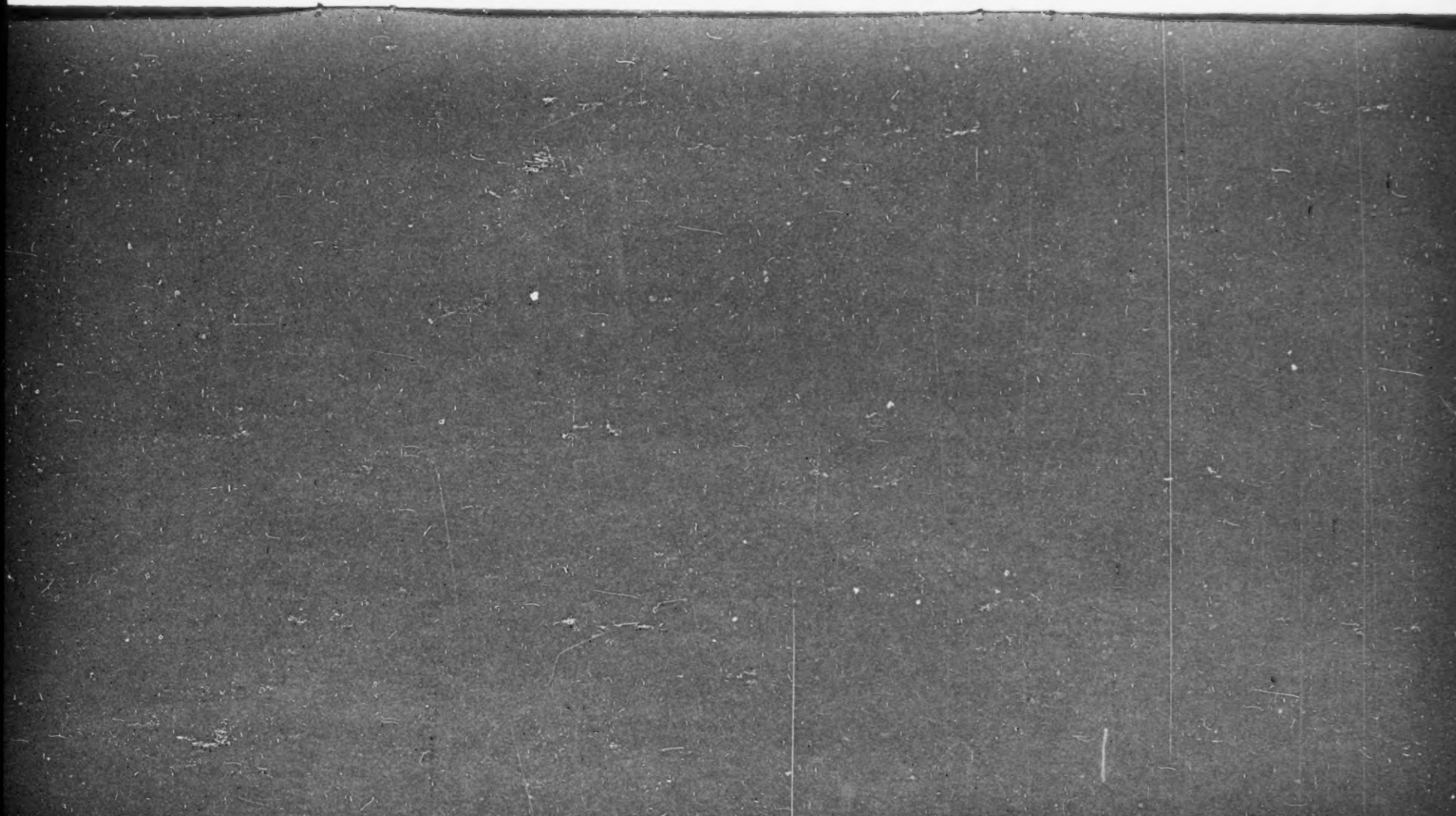
or call collect (402) 342-2831



Designation of Affiliated Corporations

Pursuant to Rule 28.1 of this Court, respondent submits this designation of corporate relationships.

1. Respondent New York Telephone Company is a wholly-owned subsidiary of NYNEX Corporation, a Delaware corporation.

2. Empire City Subway Company is a subsidiary of respondent New York Telephone Company.

3. NYNEX Corporation owns or has an interest in New England Telephone Company, NYNEX Development Company, NYNEX Business Information Systems Company, NYNEX Mobile Communications Company, NYNEX Information Resources Company, NYNEX Credit Company, NYNEX Material Enterprises Company, NYNEX Service Company, NYNEX Properties Company, NYNEX Government Affairs Company and NYNEX Communications Research, Inc.

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The decisions of the District Court and the Court of Appeals are reported at 617 F.Supp. 220 (S.D.N.Y. 1985) *aff'd*, 799 F.2d 859 (2d Cir. 1986).

No. 86-838

In The
Supreme Court of the United States
October Term, 1986

HAROLD NORDLICHT, on behalf of himself and all others similarly situated,

Petitioner,

against

NEW YORK TELEPHONE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondent New York Telephone Company (New York Telephone) opposes, and files this brief in opposition to the petition by Harold Nordlicht (Nordlicht) for the issuance of a writ of certiorari to review the decision and judgment of the Court of Appeals for the Second Circuit, dated August 25, 1986.

Statement

This case concerns the reasonableness of telephone charges made by respondent New York Telephone for telephone calls originating outside the United States and billed to petitioner Nordlicht's home telephone number in New York State. Nordlicht is an attorney who alleges that, while in Canada, he made telephone calls on his New York Telephone credit card between various points in Canada (Canada-Canada calls) and between Canada and the United States (Canada-United States calls). He claims that he was quoted a price for his calls by a Canadian telephone company in Canadian currency. New York Telephone, in turn, assertedly billed him in American currency, not making an adjustment for the existing difference in value between Canadian and United States dollars.

Nordlicht originally commenced his lawsuit in the Supreme Court of the State of New York, suing both individually and on behalf of the members of a purported class consisting of customers of New York Telephone who, during the relevant period, made Canada-United States or Canada-Canada calls and who allegedly charged those calls to their telephones within New York State.[1] The complaint sought damages based on common law theories of fraud ("Count I") and money had and received ("Count II"). Respondent removed the action to the

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[1] The events set forth in the complaint antedate the divestiture of the Bell System on January 1, 1984. Prior to that date, New York Telephone was a wholly-owned subsidiary of the American Telephone and Telegraph Company (AT&T). Today respondent is a wholly-owned subsidiary of NYNEX Corporation.

United States District Court for the Southern District of New York. Following removal, respondent moved to dismiss the complaint or, alternatively, to stay the action and refer it to the Federal Communications Commission (FCC). Nordlicht cross-moved for an order remanding the case to the New York State courts. Alternatively, Nordlicht requested summary judgment.

The District Court denied Nordlicht's motion to remand. On the merits, the District Court granted New York Telephone's motion to dismiss on Nordlicht's claim for money had and received in connection with international (Canada-United States) telephone calls.[2] The Court dismissed without prejudice the remainder of Nordlicht's claims and granted leave to replead within 20 days. Since Nordlicht failed to file an amended complaint within the 20-day period, all of Nordlicht's claims were then dismissed with prejudice.

---

[2] The FCC tariff setting forth the specific rates to be applied to international calls provides:

> "In connection with service from points outside the United States, including ships, vessels or aircraft, to points within the United States, when the charges to customers are made by telephone companies in the United States, rates as specified herein plus additional charges of foreign administrations, if any, in United States dollars, apply to all calls." Tariff FCC No. 263, Section 2.4.6.

Hence, when an American telephone company including New York Telephone, charges one of its customers for calls made to the United States from points outside the United States, the rates and practices specified in FCC Tariff No. 263 apply. Such rates are, in accordance with the express language of the tariff, applied in United States dollars. The tariff regulation by its terms applies to telephone calls from any foreign country.

On appeal, the Second Circuit affirmed the dismissal of Nordlicht's claims.[3] Before doing so, however, it affirmed the denial of Nordlicht's motion to remand, holding that—due to the comprehensive nature of Congress' regulation of telephone carriers—federal law had preempted Nordlicht's state law claims and had supplanted them with federal common law; and that the general federal question statute, 28 U.S.C. § 1331, provided a proper basis for federal jurisdiction.

———o———

Summary of Argument

The Court of Appeals' opinion is in conformity with the decisions of this Court and the other Circuit Courts that have addressed the same issues and does not raise any point meriting review by this Court.

———o———

ARGUMENT

I

Removal Was Proper

The thrust of Nordlicht's petition is that a conflict allegedly exists between the Circuits and particularly between the Ninth Circuit's decision in *Hunter v. United Van Lines*, 746 F.2d 486 (9th Cir. 1984) and the reason-

---

[3] By his petition in this Court, Nordlicht—unhappy with the decision on the merits in the federal court system—seeks the opportunity for a different result in the state courts by challenging the removal of his case to the District Court.

ing of the Second Circuit set forth in *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486 (2d Cir. 1968). The *Nordlicht* panel relied heavily on the *Ivy* case in affirming the denial of Nordlicht's motion to remand. Nordlicht is wrong in asserting that there is a conflict between the Ninth and Second Circuits on the issue of the application of the doctrine of federal preemption to removal motions when no such conflict in fact exists.

Relying on *Ivy*, the *Nordlicht* panel held that the considerations expressed in *Ivy* made it appropriate to fashion a uniform body of federal common law for resolution of claims against domestic telecommunications carriers with respect to their billing practices for calls made within a foreign country. In response to Nordlicht's contention that such a conclusion would violate the principle that a plaintiff is the "master of his complaint," the Second Circuit observed that Nordlicht had failed to reckon with the "artful pleading" doctrine in that a state law claim may properly be recharacterized as a federal claim when (a) the state law claim is preempted by federal law and (b) the only remedy available to the plaintiff is federal, *e.g.*, the state court must necessarily look to federal law in passing on the plaintiff's claim.

The approach followed in *Nordlicht* and *Ivy* is the same in the Ninth Circuit. In the *Hunter* case, for example, the Ninth Circuit likewise held that recharacterization of a complaint under the artful pleading doctrine is proper when (a) a state law claim is preempted by federal law, *and* (b) federal law provides plaintiff a remedy for the wrong allegedly sustained. *Hunter*, *supra*, at 643. Removal is only improper, the Ninth Circuit held, when federal law displaces state law but fails to replace the

state cause of action with a federal one. In other words, federal jurisdiction is lacking, the *Hunter* court said, if federal law does not provide an alternative cause of action in favor of the plaintiff to enforce his rights, as, for instance, when federal preemption acts solely *as a defense* to the state law claims. *Id.* at 643, citing with approval this Court's opinion in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

That is clearly not the case here. New York Telephone's preemption argument is not—as Nordlicht mistakenly appears to contend—solely defensive. On the contrary, Nordlicht's state law claims have been correctly recharacterized by the Court of Appeals as claims—not defenses—arising under federal common law (6a, 7a). Nordlicht's claims involve the reasonableness of charges for the provision of telecommunications services. The wrongs Nordlicht complains of relate directly to the principles and objectives set forth in the Communications Act which Congress has established for the governance of "all interstate and foreign communications by wire or radio." 47 U.S.C. § 152. His complaint, whether characterized as "overbilling," "fraud" or "money had and received," plainly implicates the validity of rates and practices included in tariffs filed with the FCC. Compliance with both state and federal law under the circumstances of this case is an impossibility and can only lead to piecemeal and possibly contradictory results in an area where considerations of uniformity of regulation are a matter of paramount interest and concern. The Court of Appeals therefore held that Nordlicht has a remedy under federal common law and that Section 1331 provides an appropriate jurisdictional basis for his suit. As Chief Judge Lumbard, speaking for the panel in the *Ivy* case, said:

> "We believe that a cause of action similarly 'arises under' federal law if the dispositive issues stated in the complaint require the application of federal common law. . . . The word 'laws' in 1331 should be construed to include laws created by federal judicial decisions as well as by congressional legislation. The rationale of the 1875 grant of federal question jurisdiction—to ensure the availability of a forum designed to minimize the danger of hostility toward, and especially suited to the vindication of, federally created rights—is as applicable to judicially created rights as to rights created by statute."

This Court concurred in the latter conclusion in *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972), specifically quoting the above language with approval.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Dated: New York, New York
November 17, 1986

Respectfully submitted,

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WALTER C. REID*
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Supreme Court, U.S.
FILED
JAN 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-838

In The Supreme Court of the United States

October Term, 1986

HAROLD NORDLICHT, on behalf of himself and all others similarly situated,

Petitioner,

vs.

NEW YORK TELEPHONE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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No. 86-838

In The Supreme Court of the United States

October Term, 1986

HAROLD NORDLICHT, on behalf of himself and all others similarly situated,

Petitioner,

vs.

NEW YORK TELEPHONE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

Petitioner Harold Nordlicht ("Nordlicht") files this brief in reply to the brief of respondent New York Telephone Company ("Nytel") served in opposition to the petition of Nordlicht for the issuance of a writ of certiorari to review the decision and judgment of the Court of Appeals for the Second Circuit, dated August 25, 1986.

SUMMARY OF ARGUMENT

The decisions of the Second and Ninth Circuit Courts of Appeals with respect to removal jurisdiction are in irreconcilable conflict and should be reviewed by this Court.

ARGUMENT

I

There Is Conflict Between The Second And Ninth Circuits With Respect To Removal Jurisdiction

The proposition that there is no conflict between the Second and Ninth Circuit Courts of Appeals with respect to removal jurisdiction can be maintained only by ignoring the language of the decisions of the two courts.

In *Hunter v. United Van Lines,* 746 F.2d 635 (9th Circ. 1984), *cert. denied,* 54 U.S.L.W. 3227 (1985), the Ninth Circuit, in reversing and remanding to District Court with instructions to remand to State Court, stated that

> "Thus, at least in this Circuit, removal is improper when federal law simply displaces state law without replacing the state cause of action with a federal one. When federal law displaces state law without supplanting it, a plaintiff cannot be deemed to be attempting to avoid a federal cause of action; there is no federal cause of action to avoid. In such a case federal preemption operates only as defense.

Hunter, 746 F.2d at 643.

The Second Circuit, however, held that "[b]ecause federal law preempts state law in the area of interstate telecommunications and Nordlicht's claims must necessarily arise under federal common law, the motion to remand was properly denied" (7a).

The contradiction between the two Circuits cannot be harmonized on the basis that the Communications Act has replaced Nordlicht's state law claims for fraud and money

had and received with federal claims because the savings clause of the Act (47 U.S.C. §414) specifically preserves pre-existing State Common Law remedies.

Nordlicht's claims do not challenge the "duties, charges and liabilities" of Nytel (6(a)). Implicit and wrong is Nytel's argument that Canadian and American currencies are interchangeable. Indeed, the substitution of one for the other without a corresponding allowance for the value differential is the gravamen of Nordlicht's state law claims. Since these state law claims have not been replaced by federal ones "[f]ederal jurisdiction is lacking whether or not the state claims are preempted." *Hunter,* 746 F.2d at 644.

CONCLUSION

For all of the foregoing reasons, this petitioner submits that a writ of certiorari should issue to review the judgment and the opinion of the Second Circuit.

Dated: New York, New York
January 8, 1987.

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